Supreme Court, U.S.
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No. 92-110

In The

Supreme Court of the United States

October Term, 1992

THE CITY OF EL PASO,

Petitioner,

v.

PHYLLIS WOODALL, et al.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether land that is impossible to build on because of its physical characteristics, unavailable because of restrictive covenants or deed restrictions, or requires costly area wide road and utility improvements in order to locate a small retail business should be considered unavailable for purposes of determining if there are sufficient alternative locations to avoid suppressing access to protected speech?

2. Whether recently established precedent for determining the validity of place restrictions on businesses offering sexually oriented press materials should be reexamined or overruled when the test developed by those cases appears workable and understandable?

LIST OF PARTIES

These Respondents rely upon the list of parties as set forth in the Petition For Writ of Certiorari

Respondents, Jedjo, Inc. and SMD Enterprises, Inc., have no parent or subsidiary companies to be listed.

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THE CITY OF EL PASO,

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v.

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Petition For Writ Of Certiorari
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BRIEF IN OPPOSITION

Respondents respectfully request this Court to deny the Petition For Writ of Certiorari to review the judgment and order of the United States Court of Appeals for the Fifth Circuit entered in *Woodall v. City of El Paso,* 950 F.2d 255 (5th Cir. 1992), and as modified in *Woodall v. City of El Paso,* 959 F.2d 1305 (5th Cir. 1992).

OPINIONS BELOW

Respondents rely upon Petitioner's recitation of the opinions below.

STATEMENT OF CASE

The following additional facts are necessary to an appreciation of the reasons why the Writ should be denied.

The Respondents operate retail adult businesses within the City of El Paso. The businesses include topless bars, topless and nude clubs, adult bookstores, and adult movie theatres.[1] The City stipulated that the business activities of the Respondents involve speech that is protected by the First Amendment to the United States Constitution. T. 640.[2]

By early 1988, the City of El Paso had enacted a series of ever more restrictive zoning ordinances regulating the location of adult businesses. In March, 1988, there were 39 adult businesses in existence in the City of El Paso. T. 193, 200-01. As a consequence of these ordinances, all 39 adult businesses were illegal and will be required to close. T. 428.

The City of El Paso has a population of 526,380. T. 920. It encompasses 247 square miles and consists of approximately 158,000 acres. T. 172. Of the total acreage available in the C-4 and C-5 zones where adult businesses are allowed to locate, approximately 50% is not available because of the 1,000 foot setback requirement from

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[1] Each of these uses is defined in the ordinances. See Petition For Writ Of Certiorari, Appendix F, pages 39a-40a, and Appendix G, Pages 44a-45a. For purposes of convenience, they will be referred to throughout as "adult businesses."

[2] The abbreviation "T" refers to the Transcript of Proceedings.

churches, schools, residences, and other protected uses. T. 186. This leaves approximately 1,433 acres which are potentially available for use by adult businesses.[3] T. 172. This represents approximately nine tenths of one percent (.009) of the entire acreage of the City of El Paso. T. 420.

Of the potentially available acres, a substantial portion has nothing on it. T. 188. There are only 600 acres of potentially available land that have buildings, streets and utilities. T. 420. This built out or developable acreage comprises .0037 percent of the total acreage of the City.[4] T. 421.

In preparing the ordinances, no one in the Planning Department attempted to determine the impact of the 1,000 foot setback requirement on adult businesses. T. 191-92. Nothing was done to ensure that a reasonable balance was maintained between the First Amendment rights of adult businesses and the zoning requirements of the City. T. 192, 195-96. Even after passage of the ordinances, no one knew whether the ordinances would

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[3] The total number of available acres is of no relevant consequence because of the 72-acre buffer zone created by the 1,000 foot separation requirement between adult businesses.

[4] The facts here should be contrasted with the facts existing in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) where the Court found ample alternative channels of communication. The available land area allowed by Renton for adult theatres consisted of more than 5% of the entire land area of the City. 475 U.S. 52. Within this area, there was no dispersion requirement. The set aside area would accommodate well over 400 theatres and surrounding parking lots. Brief of Appellant, City of Renton, page 31.

entirely exclude adult businesses from doing business within the City. T. 196.

In making its calculation of potentially available acreage, the City did not exclude property that was totally unusable for any commercial business purpose because of sink holes, ponding areas, gullies, sheer walls, or other topographical or physical impediments to building. The City simply identified land area. T. 280-81, 292, 358. No attention was paid to whether there was street access to an area. T. 361. Finally, no area was eliminated because of the impracticality or extraordinary cost of building on any of the potential sites, particularly those that might be landlocked or a great distance from the nearest access road with available utilities.[5] The standard used by the City to determine whether a location was "reasonable" was whether it complied with the requirements of the ordinance. T. 452.

Ponding areas that were identified by the City as being available are, as a practical matter, totally unavailable to any business activity because the City will not allow construction of any buildings in these areas. T. 280-83.

In addition to being physically unsuitable or unavailable for use by any small retail business, much of the land the City claims as being available is subject to restrictive covenants and other deed restrictions that prohibit its use

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[5] Respondents are owners and operators of small retail businesses. It is not reasonable to require that they be developers of large malls or capable of financing area-wide improvements, such as roads, sewers, and electrical services, in order to secure a location.

by adult businesses.[6] In preparing the ordinance, the City paid no attention to restrictive covenants or deed restrictions that applied to areas where adult businesses are allowed to locate. T. 221, 291-92.

Some restrictive covenants prohibit adult businesses as a permitted use, T. 862-64, or prohibit uses not generally considered appropriate for regional shopping centers.[7] Other restrictive covenants prohibit all retail uses.[8] Land owned by the City at the El Paso International Airport is subject to what are known as "permitted uses." These operate in the same manner as restrictive covenants, but in reverse. They specify permissible uses. All other uses are prohibited. T. 855. Adult businesses are not a "permitted use" in the airport area. T. 857.

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[6] Justice Douglas, in *Reitman v. Mulkey*, 387 U.S. 369, 384-85 (1967) (Douglas, J. concurring), noted that restrictive covenants constitute a restraint on property that, in reality, has the equivalent effect of state and municipal zoning laws. Such covenants can accomplish the same effect as a statute, thus leaving the objective to be accomplished by a system of private contracts, enforced by the State. The effect of restrictive covenants on available area cannot be ignored. To do so would allow cities to do indirectly that which they cannot do directly.

[7] Testimony at trial established that adult businesses would not be an appropriate use for a regional shopping center and would be obviously against the purpose of the deed restriction. T. 851-53.

[8] Retail uses are prohibited unless the retail use constitutes no more than ten percent of gross building area and sales consist solely of goods or products manufactured or produced on the premises or incidental retail sales of other goods and products warehoused on the premises. T. 866.

It is in the context of these facts that the Fifth Circuit found the trial courts instructions to the jury inadequate.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE FIFTH CIRCUIT IS A FAITHFUL APPLICATION OF THE TEACHINGS OF *CITY OF RENTON V. PLAYTIME THEATRES, INC.*, BASED UPON THE UNIQUE CHARACTERISTICS OF THE AVAILABLE LAND AREAS IN THE CITY OF EL PASO, AND DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

A. *YOUNG* AND *RENTON* REQUIRE THAT PLACE RESTRICTIONS ON PROTECTED SPEECH LEAVE REASONABLE ALTERNATIVE LOCATIONS.

Over the past fifteen years, this Court has fashioned a test for determining the validity of place regulations on adult businesses. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), the Court found valid a regulation that dispersed adult theatres 1,000 feet from any two other regulated uses and prohibited such theatres from locating within 500 feet of a residential area. In making its determination, the Court noted that there was no claim that distributors or exhibitors were denied access to the market. 427 U.S. 62. Justice Stevens, writing for four members of the Court, indicated that the situation would be quite different if the ordinance had the effect of suppressing or greatly restricting access to lawful speech. 427 U.S. 71, n.35. Implicit in *Young* was the conclusion that a zoning ordinance "that does not reduce significantly the number

or accessibility of theaters presenting particular films, stifles no expression." *Young*, at 81, n.4 (Powell, J., concurring).

More recently, the Court in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986), while cautioning against the enactment of zoning regulations that have "the effect of suppressing, or greatly restricting access to lawful speech," held that the First Amendment requires only that a city refrain from "effectively denying . . . a reasonable opportunity to open and operate . . . within the city . . . " It explained this by saying that adult businesses " . . . must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees . . . " *Id.* In concrete terms, this means that cities must not unreasonably limit alternative avenues of communication.[9]

The Fifth Circuit faithfully applied *Young* and *Renton* in concluding that the instructions given to the jury by the trial court did not adequately inform the jury that alternative avenues of communication cannot be found to

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[9] Petitioner erroneously asserts that *Renton* stands for the proposition that "reasonable alternatives" includes land that is physically and legally unsuitable, and not available for sale or lease in the marketplace. Pet., page 15. Moreover, Petitioner asserts that it should bear no burden of ascertaining the effect such land would have on access to protected speech. Pet., pages 19-20. Respondents submit that if Cities voluntarily undertake to impose time, place or manner restrictions on speech protected businesses, they have the concomitant minimal duty to determine the potential effect of those regulations on speech in order to insure that the regulations do not have "the effect of suppressing, or greatly restricting access to lawful speech." *Renton*, 475 U.S. 54.

be reasonably available if the physical or legal characteristics of the alleged alternatives make it impossible for any adult business to locate there. It determined that the instruction given did not provide sufficient guidance to allow the jury to answer the central question of the "time, place or manner" test, i.e., are the alternatives actually available sufficient to avoid suppressing access to protected speech?

The decision of the Fifth Circuit does nothing more than state the obvious: (1) if land is physically unsuited for any kind of development because of its topographical or physical characteristics, it is not reasonable to expect businesses, including adult businesses, to locate there or alternatively be denied access to the marketplace; (2) if land is legally not available to retail businesses, including adult businesses, it should not be considered part of the real estate market where adult businesses are required to compete, on an equal footing, with other purchasers and lessees of commercial retail space; and (3) it is unreasonable to require small retailers, such as adult businesses, to become area-wide developers required to install streets and utilities, costing many millions of dollars, in order to secure a location for their businesses.

Renton requires that cities make available ample reasonable alternative avenues of communication if they choose to regulate the location of adult businesses. The opinion of the Fifth Circuit is fully consistent with that direction. It simply requires that the trial court instruct the jury that if land is, in actuality, unavailable for any commercial use, it should not be considered in determining whether ample alternatives exist.

B. THE FIFTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

The narrow holding of the Fifth Circuit is not in conflict with the decisions cited by Petitioner.

In *Alexander v. City of Minneapolis*, 928 F.2d 278 (8th Cir. 1991), the Court examined the record and found 120 potentially available locations. Noting that other adult businesses had been able to find suitable relocation sites, the Court Of Appeals found the economic argument that available locations were economically unfeasible, or not for sale or lease, unpersuasive. Here, the Court retracted its opinion regarding economic feasibility and decided only that the jury was improperly instructed in how to determine if there were ample reasonable alternatives.

In *International Food & Beverage Systems v. City of Fort Lauderdale*, 794 F.2d 1520 (11th Cir. 1986), the Court did little more than remand the case back to the trial court for further consideration in light of this Court's decision in *Renton* and the trial court's failure to make any finding as to how many sites were available in addition to existing nonconforming uses.[10] The Court did note, however, that *Renton* requires, at a minimum, a "physically adequate

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[10] The Petitioner erroneously asserts that the Court "upheld" the ordinance in *International Food & Beverage Systems v. City of Fort Lauderdale*. Pet., page 17. In vacating the decision of the district court, the Court said: "We think that remand to reconsider and retry in light of the *Renton* case is the most appropriate measure for us to take." 794 F.2d 1527.

forum," 794 F.2d 1526, a holding completely consistent with the decision of the Fifth Circuit.

The Fifth Circuit merely held that the jury was improperly instructed with respect to what land could be considered constitutionally available in order to determine if there were, in fact, reasonable alternative avenues of communication. In each of the relevant decisions relied upon by Petitioner, the Court found evidence in the record to establish that adequate alternative locations were available or that the economic profitability of available and suitable locations was not a proper issue for consideration. See also, *FW/PBS v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988) and *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988).

II. THE ISSUE OF WHETHER THE REGULATION OF ADULT BUSINESSES THROUGH ZONING ORDINANCES INVOKES CONSTITUTIONAL SCRUTINY WAS NOT CONSIDERED OR DECIDED BELOW AND IS AN ISSUE THAT HAS BEEN RECENTLY AND AUTHORITATIVELY RESOLVED BY THIS COURT TO REQUIRE USE OF THE "TIME, PLACE OR MANNER" TEST, PARTICULARLY WHERE PURE SPEECH IS INVOLVED.

A. THIS COURT SHOULD NOT CONSIDER ISSUES NOT DECIDED BELOW.

The simple issue below was whether the El Paso zoning ordinances, which regulate the location of adult businesses, provide reasonable alternative avenues of communication. The City stipulated that the business activities of all of the Respondents involve speech that is protected by the First Amendment. T. 640. In addition,

the City stipulated that the constitutionality of the ordinances should be measured by the time, place or manner test developed in *Renton*. Brief For Appellee City Of El Paso, (filed in the Court below), pages 8-9.

The Petitioner has now invited this Court to decide the broader question of whether zoning ordinances regulating the location of adult businesses continue to invoke constitutional scrutiny in light of the Court's decision in *Barnes v. Glen Theatres, Inc.*, 111 S.Ct. 2456 (1991). This issue was not raised to the trial court, nor was it raised in the Fifth Circuit until the filing of Petitioner's Petition For Panel Rehearing. The Fifth Circuit declined to comment on the issue in its Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc.

Generally, this Court will not decide questions which have not been passed upon by the Court of Appeals. *United States v. Fleischman*, 339 U.S. 349, 365 (1950). It sits as a court of review and only in exceptional cases will it review questions not raised in the courts below. *Duigan v. United States*, 274 U.S. 195, 200 (1927). See also *Lawn v. United States*, 355 U.S. 339, 362, n.16 (1958). There are no exceptional circumstances here to justify disregarding this practice.

B. THE EL PASO ZONING ORDINANCES REGULATE PURE SPEECH AND ARE THEREFORE NOT SUBJECT TO THE SAME ANALYSIS UTILIZED BY THE PLURALITY IN *BARNES v. GLEN THEATRE, INC.*

The uses subject to the controls of the El Paso zoning ordinances include adult bookstores, adult motion picture theatres and nude live entertainment clubs.

It is beyond ingenious dispute that books and magazines sold at adult bookstores are presumptively entitled to the full protection of the First Amendment. Similarly, motion picture films exhibited at adult theatres enjoy the same degree of protection. *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495 (1952).

With respect to live nude entertainment clubs, this Court has often held that entertainment enjoys First Amendment protection. *Winters v. New York,* 338 U.S. 507, 510 (1947); *Zacchini v. Scripps-Howard Broadcasting Company,* 433 U.S. 562, 578 (1977). In addition, this Court has repeatedly implicitly found nude dancing, as entertainment, to be within the penumbra of the First Amendment. *See,* among others, *California v. LaRue,* 409 U.S. 109 (1972); *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 932-933 (1975); and *Shad v. Borough of Mount Ephraim,* 452 U.S. 61, 65-66 (1981).

Most recently this Court had occasion to consider directly whether nude dancing is speech protected by the First Amendment. In *Barnes v. Glen Theatre, Inc.,* supra, eight justices found that nude dancing is expressive conduct which enjoys First Amendment protection.

The issue in *Barnes* was the level of protection to be afforded the expressive conduct at issue, and a determination of whether the statute was an impermissible infringement of protected activity. 111 S.Ct. 2460. The Court turned to *United States v. O'Brien*, 391 U.S. 367 (1968) for guidance. There, this Court had previously held that expressive conduct could be narrowly regulated or forbidden in pursuit of an important or substantial governmental interest that is unrelated to the content of the expression regulated.

> . . . when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important government interest in regulating the nonspeech element can justify incidental limitation on First Amendment freedoms. Id., at 376-377, 88 S.Ct., at 1678-1679.

While the result of the Court's decision in *Barnes* was to uphold a statute of general application prohibiting all public nudity, the analysis employed by the Court recognized the important and fundamental First Amendment concerns involved and carefully scrutinized the ordinance to insure no constitutional violation.

Here, the zoning ordinances at issue regulate much more than the expressive conduct described in *Barnes;* they regulate pure speech in the form of books and magazines sold at adult bookstores and motion picture presentations at adult motion picture theatres.[11] This difference makes the "expressive conduct" analysis of the

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[11] Petitioner misstates the nature and effect of the zoning ordinances at issue by suggesting that their reach is no different than the public nudity proscribed by the statute in *Barnes*. Pet., page 22. Petitioner ignores the clear reach of the ordinances to

Court in *Barnes* inapplicable to the ordinances here.[12] Where pure speech is involved, the Court must employ the time, place or manner test developed for evaluating restrictions on speech protected activity.[13]

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books, magazines and motion pictures.

[12] In *World Wide Video v. Tukwila*, 117 Wn.2d 382, 388, 816 P.2d 18 (1991), *cert. denied*, 112 S.Ct. 1672 (1992), the Washington State Supreme Court, faced with the same question, said:

> . . . the written or filmed materials distributed by WWV are "pure" speech for the purposes of the First Amendment. By its own terms, the *Barnes* decision does not apply to "pure" speech; thus *Renton* remains the appropriate starting point for cases of this type.

[13] In *Barnes*, 111 S.Ct. 2465-66, Justice Scalia stood alone in his determination that the statute did not implicate the First Amendment. However, he carefully pointed out that his view was limited to "expressive conduct" and that pure speech was entitled to the full protection of the First Amendment.

> When any law restricts speech, even for a purpose that has nothing to do with the suppression of communication (for instance, to reduce noise, see *Saia v. New York*, 334 U.S. 558, 561 (1948), to regulate election campaigns, see *Buckley v. Valeo*, 424 U.S. 1, 16 (1976), to prevent littering, see *Schneider v. State*, 308 U.S. 147, 163 (1939)), we insist that it meet the high, First-Amendment standard of justification.

C. NO FACTS OR CIRCUMSTANCES EXIST TO JUSTIFY IGNORING ESTABLISHED PRECEDENT FOR DETERMINING THE VALIDITY OF TIME, PLACE OR MANNER RESTRICTIONS PLACED UPON BUSINESSES DEALING IN SEXUALLY ORIENTED SPEECH MATERIALS PROTECTED BY THE FIRST AMENDMENT.

Beginning with *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), this Court held that adult businesses that cause secondary effects upon the surrounding community do not have talismanic immunity from zoning laws that seek to regulate their location so long as the regulation is aimed at curing the evils caused by the business activity, and not at the content of the speech itself. Ten years later, in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court utilized the "time, place or manner" test developed for evaluating restrictions on expression taking place on public property to find a City of Renton zoning ordinance regulating the location of adult theatres constitutional. *Renton* requires that content neutral adult entertainment zoning ordinances must serve a substantial governmental interest and allow for reasonable alternative channels of communication. 475 U.S. 49, 50.

In order to be upheld, time, place or manner restrictions must also be "narrowly tailored" to achieve the articulated governmental interest. *Clark v. Community of Creative Non-Violence*, 468 U.S. 288, 293 (1984). This same principle was applied in *Renton*. There, this Court said:

> Moreover, the Renton ordinance is "narrowly tailored" to affect only the category of theaters

> shown to produce the unwanted secondary effects, thus avoiding the flaw that proved fatal to the regulations in *Shad v. Mount Ephraim*, 452 U.S. 61 (1981) and *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

475 U.S. 52.

Since *Renton*, the method of analysis developed there has been employed again and again by state and federal courts to pass upon the validity of municipal zoning ordinances which regulate the location of adult businesses. For example, see *SDJ, Inc. v. City of Houston*, 837 F.2d 219 (5th Cir. 1988); *Tollis, Inc. v. San Bernardino*, 827 F.2d 1329 (9th Cir. 1987); *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1258 (5th Cir. 1988); *Alexander v. City of Minneapolis*, 928 F.2d 278 (7th Cir. 1991); *North End Cinema, Inc. v. Seattle*, 90 Wn.2d 209, 585 P.2d 1153 (1978); *People v. Superior Court (Lucero)*, 259 Cal. Rptr. 740 (1989); *World Wide Video v. City of Tukwila*, 117 Wn.2d 382, 816 P.2d 19 (1991), *cert. denied*, 112 S.Ct. 1672 (1992).[14]

Respondents submit that none of circumstances which may prompt this Court to overrule its established precedent exist so as to justify abandoning the methodology of *Young* and *Renton*.

In *Casey v. Pennsylvania*, 112 S.Ct. 2791 (1992), this Court discussed and reviewed the circumstances under which it will abandon or overrule established precedent.

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[14] The forgoing list of citations is not meant to be exhaustive. The citations are merely representative of the many state and federal cases that have utilized, without difficulty, the *Renton* analysis.

> . . . . when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proved to be intolerable simply in defying practical workability . . . ; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation . . . ; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine . . . ; or whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification . . . (citations omitted).

1992 WL 142546, *13 (U.S.)

A review of the many post *Renton* decisions establishes that the test of *Renton* has not been found "unworkable," "a doctrinal anachronism discounted by society," or "irrelevant or unjustifiable" in dealing with the issue of regulating speech protected activities. 1992 WL 142546, *14 (U.S.). Rather, the many courts that have dealt with the issue have had no difficulty understanding and applying the test. Equally as important, the cases demonstrate that, in most instances, municipalities have had no difficulty understanding and meeting the minimal burdens imposed by the test to insure that protected speech is not unreasonably or unnecessarily burdened.

Petitioner has offered no justifiable basis for reexamining or overruling *Young* and *Renton*, and the Court should decline its invitation to do so.

CONCLUSION

The Writ of Certiorari should be denied.

Respectfully submitted,

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